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No. 482

In the

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FANT MILLING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT, FANT MILLING COMPANY

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BRIEF FOR RESPONDENT, FANT MILLING COMPANY

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the record. (R. 538-552.) The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 117 N. L. R. B. 1277 and appear in the record filed herein. (R. 117-182.)

II.

JURISDICTION

Jurisdictional requisites are stated in Petitioner's brief. However, the question presented to this Court by petitioner is not the question properly before the Court.

III.

QUESTIONS PRESENTED

1. Whether or not the National Labor Relations Board can rely upon transactions occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, which are neither related to nor grow out of violations of the Act existing at the time the charge is filed, as constituting a violation of the Act and the basis of an order.

2. Whether or not the National Labor Relations Board has jurisdiction of a matter wherein the complaint is issued contrary to its published rules and regulations and the Administrative Procedure Act.

IV.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended *(161 Stat. 136, 29 U. S. C. 151 et seq.)*, appear in the brief of petitioner at pages 2-3.

The pertinent provisions of the *Administrative Procedure Act, 5 U. S. C. A. 1001 et seq.*, reads as follows:

> "5 U. S. C. A. 1002—(a) Every agency shall separister (1) descriptions of its central and field organizations including delegations by the agency of final authority and the established place at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

The pertinent provisions of the Board's *Rules and Regulations* and *Statements of Procedure*, which have been published in the Federal Register, are as follows:

> *NLRB Rules and Regulations, Section 102.12 (d)*
>
> Such charge shall contain the following:
>
> (d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.
>
> *NLRB Rules and Regulations, Section 102.19*—If, after the charge has been filed, the Regional Director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action

by filing a request therefor with the General Counsel in Washington, D. C., and filing a copy of the request with the Regional Director, within 10 days from the service of the notice of such refusal by the Regional Director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based."

NLRB Statements of Procedure, Section 101.2

Initiation of Unfair Labor Practice Cases

* * * a blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

NLRB Statements of Procedure, Section 101.6

—If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the General Counsel in Washington, D. C., within 10 days. If the complainant appeals to the General Counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the General Counsel with the assistance of his staff. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds of his affirmance, or may direct the Regional Director to take further action."

V.

STATEMENT

A.

The Facts

The Respondent is a Texas Corporation, engaged in the milling of flour and the manufacture of related products with its principal place of business at Sherman, Grayson County, Texas. There has at no time been a labor dispute nor any labor difficulty at Respondent's plant. The only activity involving its employees with a labor organization at its plant was in about the year 1948 when the American Federation of Grain Millers Union attempted to organize the employees of the plant but the Union refused to sign a contract because it did not contain a vacation clause. (R. 482-483.) There were no labor difficulties at the plant on that occasion and the employees lost interest in the union and the union abandoned its efforts. (R. 483-486.) The same union returned to Respondent's plant in an effort to organize its employees in the year 1953. On June 19, 1953, an election was held in which the ballots were cast 94 in favor of the union and 85 against. (R. 190.) Respondent employs about 200 people. In due course, the union involved was certified as the bargaining agent for the employees. Subsequently, Respondent and the union met in at least 19 bargaining sessions or conferences which occurred on various dates between September 5, 1953 and November 19, 1954. The parties were unable to agree upon a contract. Many agreements were reached upon specific provisions of

the contract but the parties had agreed at the outset that no agreement on a particular provision would be binding until an entire contract had been agreed to. (R. 490.) In fact, the only two provisions upon which an agreement was not reached that resulted in a contract not being signed by the union were those of seniority and arbitration. Such was the statement of the Union organizers made at the September 17, 1954 meeting. (R. 433; 514.)

During the long course of negotiations, many facets regarding a proposed contract were discussed. Respondent's President, James Fant, instructed those that were handling negotiations for the committee to negotiate a workable contract and let it be known that he did not desire a contract that contained an arbitration clause, a no-strike clause without a monetary penalty for its breach, or seniority as the sole governing factor in promotions and layoffs. (R. 232-233; 491.) President Fant at the same time instructed his committee that he wanted a workable contract negotiated. (R. 492.)

Respondent and the union bargained on all proper matters. As late as September 17, 1954 the union announced that the only matters standing in the way of a contract were seniority and arbitration. (R. 514.) During this period of time, various concessions and agreements were made, much too numerous to detail. However, Petitioner has given some distorted statements to the court in this connection (BB 4-7), and Respondent feels compelled to impose on the Court in this connection to some extent.

On request by the Union, Respondent furnished to the union its job classification and wage rates, statement of Petitioner to the contrary notwithstanding. (R. 100-103; 516-518.) Respondent did not furnish the union a seniority list during the negotiations because it did not have such available, not having a record of when each of its employees commenced work. (R. 458-459; 462-464.) Respondent offered to get for the union what information it had in this regard available, which the union was unwilling to accept. (R. 426-429.) Also, during the course of negotiations, some wage changes were made. At one of the negotiation conferences, April 8, 1954, the union made objection to Respondent having too many classifications at the same wage rate in its feed mill. (R. 207.) At the next meeting, April 22, 1954, Respondent pointed out to the Union that it would make some adjustments in its feed mill in keeping with earlier objections by the union. (R. 396-397; 517-518.) The union expressed satisfaction with this concession made by Respondent in an effort to arrive at a workable contract. (R. 546.) On October 6, 1954, Respondent put into effect a wage increase, made effective as of October 4, 1954. The union was notified of such proposed wage increase on October 5, 1954 and made no objection thereto. (R. 480-481; 494.) The wage increase was in keeping with Respondent's established policy of keeping its wages comparable with those in the area, which policy the union well knew. (R. 468-659.) Respondent desired to maintain the right to raise wages if it saw fit, feeling this was or should be a prerogative of management. However, Respondent was willing to

agree to contract to pay at least the present wages during the period of the contract. (R. 281.) The union itself agreed to this proposal on April 2, 1954. (R. 281.) The Company, after the union changed its mind about this provision, suggested that a range of certain minimums and maximums be set up, which the union refused to do. (R. 509-511.) In fact, the union did not desire to and would not freely discuss wages during the long course of contract negotiations. (R. 341-342; 430; 501.)

Also, Respondent had for a few years granted a one week's paid vacation at its plant but it did not desire to contract to pay for the vacation for any certain definite period of time. (R. 244.) With regard to a no-staggered work week, Respondent did not desire to contract to such but advised the union that it might agree to it providing some offsetting advantages were set up for the company. (R. 264; 302.) Not only did the union refuse to discuss wages during the course of the contract negotiations above pointed out, but was adamant in other regards. The union announced in no uncertain terms that it was going to have an arbitration clause or else. (R. 514-515.) The union was adamant in its position with regard to a seniority clause controlling promotions, demotions, layoffs and recalls. (R. 44-48.) Respondent was willing to let seniority control in these matters when men were of equal ability. The union refused to agree. (R. 503-506; 510-511.) In fact, notwithstanding that the labor commissioner, Morrow, thought Respondent's proposal of seniority was reasonable, the union stated that it sounded like h--l to it. (R. 496-497.)

Contrary to Petitioner's statement, that during this long course of negotiations, the union conceded on many of its proposals, the union did not agree to abandon any of its proposals contained in its original contract other than the check-off clause. (R. 484.) Nor did the union at anytime submit a new proposal after submission of its original contract. (R. 485.) The union would not modify its demand for daily overtime (R. 486); it would not modify its demand for double time for Sunday work (R. 488); it did not recede from or modify its demand for two and one-half time straight time hourly pay for holiday work (R. 488); the union at no time agreed to modify its demand for four hours minimum reporting pay time (R. 489); the union would not bargain at all on liability for walk-outs (R. 496); the union refused to modify its demand for a strict seniority clause providing that length of service alone control promotions, lay-offs and recalls, etc. (R. 503-506); and as heretofore pointed out, the union absolutely refused to yield from its demand for arbitration. (R. 514-516.) At one time the union suggested that if the company would leave out the no-strike clause it would abandon its arbitration clause. (R. 401-402.) Thus, its willingness to give up the arbitration proposal was a conditional one made on April 22, 1954. However, the union abandoned this concession, if such it was, as is shown clearly by its statement made several times on September 17, 1954, that there was going to be an arbitration clause. (R. 514-516.) The same statement was made by the union at the previous bargaining conference of August 27, 1954. (R. 514.)

Respondent submits that it, during the course of the negotiations, not only met and bargained on issues, fully and completely, but conceded on various important points during the course of the negotiations. For instance, Respondent, at the insistence of the union, agreed to a different shift differential among its employees. (R. 496.) It agreed to make certain wage adjustments in its feed mill at the request of the union as heretofore pointed out, it agreed on the union's grievance procedure and a limited form of arbitration (R. 500-507), and it agreed to the holidays requested by the union. (R. 264; 282; 500.) Respondent was willing to give certain reporting in and call back pay. (R. 522-523.) It conceded to give certain reporting time and reporting pay to truck drivers. (R. 523-525.) Respondent expressed a willingness to yield its demand for the right to raise wages so as to make such within certain maximum and minimum ranges. (R. 508-509.) Thus, while no agreement was reached, certainly Respondent engaged in the bargaining processes in good faith toward reaching an agreement.

B.

The Charge and the Complaint

On May 20, 1954, the union filed a charge against Respondent. (R. 19-22.) The union stated therein that the basis of the charge, insofar as this matter is concerned, was that on or about November 20, 1953, Respondent refused to bargain collectively with the union. (R. 20.) This is the only charge that was at anytime filed against Respondent.

On July 13, 1954, the Regional Director advised the parties that he was refusing to issue a complaint based upon the charge. (R. 25.) On July 31, 1954, the union made a request, allegedly pursuant to Section 102.19 of the *Board's Rules and Regulations*, for review of the Regional Director's decision. This request for review was not made within ten days from the time of the decision of the Regional Director pursuant to Section 102.19 of the Board's Rules and Regulations (supra). No action was taken by General Counsel upon the request for review. Nevertheless, on January 24, 1955, more than six months after such request was made, the Regional Director advised the parties by letter that he was withdrawing his refusal to issue a complaint with respect to the allegation of refusal to bargain contained in the charge and would proceed further with investigation. (R. 80-81.) During this period of time the office of General Counsel was vacant, it having been vacant from December 20, 1954 to March 29, 1955. (R. 132.) It was not until immediately before the issuance of the complaint, on August 12, 1955, that General Counsel was heard from wherein he advised the parties that further inquiries with respect to the alleged 8 (a) (5) allegation should be addressed to the Regional Director and that the ruling of the Regional Director on the 8 (a) (1) and (3) allegations was sustained. (R. 82-83.) Almost immediately, on August 17, 1955, a complaint was issued by the Regional Director alleging violation of Sections 8 (a) (1) and (5) of the Act. (R. 84-89.) Finally, a hearing was conducted and the Board issued its order now sought to be enforced.

C.

The Order of the Board

The Board issued an order on April 19, 1957, joined in by three members of the Board with one member dissenting, wherein it finds that Respondent violated the Act by refusing to bargain. In its decision, the Board states that the issue is whether or not Respondent was justified in its refusal to bargain with the union subsequent to November, 1954. (R. 118.) The Board bases its decision that Respondent has refused to bargain in violation of the Act upon an alleged and found to be unilateral general wage increase put into effect by Respondent on October 7, 1954. (R. 124.) The Board also further states in this connection that it finds that the October 1954 unilateral increase provides "the final insight into Respondent's conduct of negotiations with the union." (R. 126.) The dissenting member of the Board agreed with Respondent that Respondent had been prejudiced in the issuance of the complaint by the irregular procedural methods used by its agencies in the issuance of the complaint and that the Board did not have jurisdiction of the complaint because its *Rules and Regulations* and the *Administrative Procedure Act* had not been complied with. The dissenting member of the Board was further of the opinion that inasmuch as it was the October 1954 wage increase which constituted the basis for the order, that such was in contravention of Section 10 (b) of the Act and an order based upon such occurrence, it having occurred five and one-half months after the charge was filed and almost ten months before the complaint was issued, could not stand. (R. 129-135.)

D.

The Decision of the Court Below

Upon the Board seeking enforcement of its order, the Fifth Circuit Court of Appeals refused enforcement of the Board's order on the grounds that the Board had looked to and was relying upon the October 1954 wage increase as constituting an unfair labor practice, which it seeks to restrain, and the Court held that the charge in this case grew out of seven bargaining sessions held by union and Respondent between November 21, 1953 and May 20, 1954 and that the Board had not found and there was no evidence to reflect any lack of good faith practiced by Respondent during that period. The Court further held that no charge having been filed, to include such, the Board was precluded from finding that Respondent had violated the Act basing the finding upon an event occurring more than four months after the filing of the charge; that to hold that the Board could adjudicate the rights of parties upon events occurring subsequent to the filing of the charge which did not grow out of or relate to pre-existing unfair labor practices would be contrary to the statutory scheme. (R. 538-548.) It is from this holding that Petitioner applied for and was granted Writ of Certiorari to this Court.

VI.

Summary of Argument

Congress has provided in Section 10 (b) of the National Labor Relations Act that no complaint shall issue based upon any unfair labor practice occurring more than six

months prior to the filing of a charge. It is accepted in our jurisprudence that a charge must be filed before the National Labor Relations Board has authority or jurisdiction to issue a complaint. The Board relies upon this Court's decision in the case of *National Licorice Company v. N. L. R. B., 309 U. S. 350, 367-369* as authority for it taking cognizance of actions occurring long subsequent to the filing of the charge herein and finding that those actions constitute a violation of the Act. The *National Licorice* case is not authority for the position of the Board. In the *National Licorice* case, the company there involved, was engaged in violation of the National Labor Relations Act at the time of the filing of the charge. The Board merely held therein and this Court sustained its holding, that the Board could deal with unfair labor practices growing out of those alleged in the charge while the proceeding is pending before the Board. There is a manifest difference in that situation where violations of the Act have occurred prior to the filing of the charge out of which the subsequent events grow and one where, as here, the rights are adjudicated upon the subsequent events, the period prior to the filing of the charge serving only as background. (R. 544.) In the case here before the Court, there was no proof, and no one prior to now, before this Honorable Supreme Court of the United States, has attempted to contend that at the time the charge herein was filed, there is any proof that Respondent had violated the Act. (R. 547-548.) Rather, in this case, the Board finds that subsequent to the filing of the charge, Respondent violated the National Labor Rela-

tions Act and then by some process of reasoning, not understandable to Respondent, finds that it follows that Respondent, though there was no evidence of it, was likewise violating the Act at the time the charge was filed. The Board fails to distinguish in this case between those situations in which violations of the Act are committed prior to the time of the filing of the charge, and subsequently other violations of the Act occur, which grow out of or are related to the violations which had occurred at the time of the filing of the charge, and those situations wherein no violation of the Act has occurred at the time of the filing of the charge. There is a difference in the two situations. There is authority for the Board asserting jurisdiction in the former situation. There is no authority for the Board asserting jurisdiction in the latter situation, wherein no amended charge is filed, and wherein the events in question occur more than six months prior to the issuance of the complaint. To permit the Board to assert jurisdiction in the latter situation is in direct contravention of Section 10 (b) of the Act, and permits it "carte blanche to expand the charge as it might please, or to ignore it altogether." (R. 544.)

Further, in this case, the Board has violated several provisions of its published *Rules and Regulations and Statements of Procedure*, contrary to the *Administrative Procedure Act*. The Regional Director of the National Labor Relations Board first refused to issue a complaint upon the charge filed. The charging union, eighteen days later made a request for review of the Regional Director's action. The

Regional Director's action occurred on July 13, 1954. The union's request for review was made on July 31, 1954. Section 102.19 of the *Board's Rules and Regulations* provides that a party must make request for review within ten days after the Regional Director's action. This was not here done. Section 101.6 of the *Board's Statements of Procedure* provides that upon request for review being made, the entire file is sent to Washington, D. C. where the case is reviewed by General Counsel and General Counsel may sustain the Regional Director's dismissal or may direct the Regional Director to take further action. While the matter was pending in the General Counsel's office, and while the office of General Counsel was vacant, the Regional Director on January 24, 1955, notified the parties that he was withdrawing his refusal to issue the complaint with respect to the alleged violations of Section 8 (a) (5) of the Act. At this time, the Regional Director had no jurisdiction over the charge, it then having been dismissed or before General Counsel upon an untimely request for review. On August 12, 1955, General Counsel wrote the parties a letter advising them that he was affirming the Regional Director's refusal to issue a complaint on the alleged violation of Section 8 (a) (1) and (3) of the Act, and that the Regional Director had previously withdrawn his dismissal of the allegations of Section 8 (a) (5) of the Act. Notwithstanding, the Regional Director forthwith issued a complaint alleging that Respondent had violated Section 8 (a) (1) as well as 8 (a) (5) of the Act.

The *Administrative Procedure Act, 5 U. S. C. A. 1001*, et seq., requires that an administrative agency, such as the National Labor Relations Board, publish its Rules and Regulations in the Federal Register and that no person shall in any manner be required to resort to organization or procedure not so published. The aforementioned Rules and Regulations and Statement of Procedure of the Board were published in the Federal Register. The Board did not comply therewith in this instance and Respondent is being required to resort to organization and procedure not so published, directly contrary to *The Administrative Procedure Act.*

It has not heretofore been contended by any party that there was any evidence, much less substantial evidence, upon which to base the Board's finding of Respondent's refusal to bargain prior to the October wage increase. The Court below specifically and properly refused to pass on this question because it was not necessary to its decision. (R. 539-540.) However, Petitioner here seeks to have this court pass for the first time upon this question, now contending that there is sufficient evidence upon which to support the Board's finding of refusal to bargain, based only upon events and conduct occurring prior to the filing of the charge. Respondent respectfully submits that such matter is not properly before this Court. If such was to be the position of Petitioner, it should have so stated and asserted before the Court below. Such a matter is first and primarily for the decision of the Court of Appeals, and in any event should not be passed upon by this court until the Court of Appeals acted thereon and then only if the Court

of Appeals arrived at a decision which fair minded Judges could not make. As has been heretofore pointed out, Respondent met and bargained upon all subjects of bargaining up until November 1954. As stated by the Court below, neither the Trial Examiner nor the Board found, and the evidence does not reflect, that any lack of good faith existed prior to the filing of the charge. During that period of time, the parties discussed at length the various items of the contract, each making counter offers and suggestions, and on most items tentative agreements were reached. (R. 546.) Also, there is not substantial evidence to support a finding that the complained of October wage increase and the November withdrawal of recognition of the union were violations of the Act. However, neither is this question of substantiality before the Court. The sole and only question before the Court in connection with the October and November events is whether or not the Board may make an order based upon such events, they having occurred long subsequent to the filing of the charge and more than six months prior to the issuance of the complaint. It is the plain dictate of the Act that it may not. Further, the Board has in effect so provided by Section 102.12 of its *Rules and Regulations* and Section 101.2 of its *Statements of Procedure.*

VII.
ARGUMENT
A.
First Question

Whether or not the National Labor Relations Board can rely upon transactions occurring subsequent to the filing

of the charge and more than six months prior to the issuance of the complaint, which are neither related to nor grow out of violations of the Act existing at the time the charge is filed, as constituting a violation of the Act and the basis of an order.

1. The Charge Does Not Include Events Subsequent to May 20, 1954

Congress has seen fit to place within the National Labor Relations Act a provision requiring anyone who wishes to allege a violation thereof to file a charge with the Board, setting forth, among other things, a clear and concise statement of the fact constituting the alleged unfair labor practices. *National Labor Relations Act*, Section 10(b). Sec. 101.2 *N. L. R. B. Statements of Procedure*, Sec. 102.12 *N. L. R. B. Rules and Regulations*. There are numerous decisions, and it is accepted by everyone that until the charge is filed the National Labor Relations Board has no jurisdiction whatsoever. The Act also provides that after the charge is filed the Board may issue a complaint "stating the charges in that respect." Congress saw fit to further provide that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. As stated by the Court below, the authority of the Board is derived solely from the statute. In this case, a charge was filed on May 20, 1954, and was at no time amended. The Regional Director investigated the charge, found insufficient evidence that Respondent had violated the Act and on July 13, 1954 refused to issue a complaint. On July 31, 1954, a request for review of this decision was made, though not timely, as hereinafter

pointed out. For some reason this request for review was never acted upon by General Counsel. However, more than one year subsequent to the request for review being made, the Regional Director issued the complaint here in question upon which the hearing was held and the Board's order based. The gravamen of the complaint is that Respondent on or about October 6, 1954, put into effect a general wage increase which violated the Act. This places in the complaint a matter that was not in the charge and a matter that is not related to and does not grow out of any violation of the Act complained of or set forth in the charge. In fact, it is self evident, and the Board has conceded up until this proceeding, that but for the October 7, 1954 wage increase, there would be no violation of the Act by Respondent. The Board now argues before this Court, for the first time, that Respondent was guilty of refusal to bargain prior to May 20, 1954, the date of the filing of the charge. However, even before this Court, the Board continues to concede that but for the October 7, 1954 wage increase by Respondent and subsequent withdrawal of recognition of the union by Respondent, there would not be sufficient evidence to support a finding of a refusal to bargain by Respondent. In fact, the Board stated in its order that the granting of the wage increase gave it a "final insight" into Respondent's conduct of negotiations with the union. (R. 13.)

Petitioner cannot now argue in good faith that the October 7 wage increase relates back to the April 19 wage increase. The Circuit Court expressly found that its April 19 increase "was the result of the discussions between the

parties and was initiated by the union." (R. 546.) The Union approved the April 19 wage increase and did not specify it in its charge filed some four weeks later. The silence of the charge on this point means much since it was signed by Cox, one of those whom the Circuit Court found to be "experts who made the negotiation of contracts their life's work." (R. 539 n. 4) Additionally, the Board itself has seen fit to provide by its Statements of Procedure and Rules and Regulations that the charge shall set forth the facts constituting the alleged violation of the Act. *N. L. R. B. Rules and Regulations, Section 102.12; N. L. R. B. Statements of Procedure, Section 101.2* By no stretch of the imagination, can it be reasoned that the charging party in this case contemplated the April 19 wage increase as constituting a violation of the Act. Nor by any stretch of the imagination can it be reasoned that the charging party in this case set forth any allegations or facts in its charge out of which the subsequent events, the October wage increase and November withdrawal of recognition upon which Petitioner relies, grew or are related.

2. The National Licorice Case Is Not Apposite

The Board relies upon the case of *National Licorice Company v. N. L. R. B., 309 U. S. 350* as authority for its position. That case is not authority for the position taken by the Board. The *National Licorice Company Case* was decided by this Court prior to the 1947 amendment placing the six month statute of limitation in the Act. Respondent

submits that this in itself places a limitation upon the meaning and import of this Honorable Court's decision in the *National Licorice Company Case*. However, notwithstanding such amendment, this court held only in that case that the National Labor Relations Act does not preclude the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. In that case it was determined to the satisfaction of this court that the employer therein was guilty of certain unfair labor practices at the time of the filing of the charge, as alleged in the charge, and that the subsequent violations of the Act were related to and grew out of, and under the facts were an actual continuation of, the identical unfair labor practices which the employer therein had committed prior to the filing of the charge. Such is not here the case. The Board in this case wishes to look to subsequent acts as constituting a violation of the Act, without which it concedes there would be no violation, then relate that finding back to a date preceding the filing of the charge, and infer therefrom that Respondent was violating the Act at the time the charge was filed. In this connection it is now called to the attention of the court that General Counsel announced during the hearing that the Board had no act constituting a violation of Section 8(a)(5) of the Act until an act relied upon which occurred at the end of negotiations. (R. 479-480.)

There is a material difference between the holding in the *Licorice* case and the position of the Board in this case. On the one hand, this Court and other courts have permitted

the Board to look forward from the time of the violation of the Act occurring prior to the filing of the charge and take jurisdiction of *related* acts growing out of and constituting a continuation or prolongation of that violation. On the other hand no court has held, and Respondent respectfully submits that it is directly contrary to the Act, that the Board may look to an act occurring subsequent to the filing of the charge in the first instance as constituting a violation of the Act. To so hold will render Section 10(b) of the Act meaningless. Particularly would such a holding render meaningless the six month limitation provision therein contained where the acts relied upon occurred not only subsequent to the filing of the charge but more than six months prior to the issuance of the complaint.

The purpose of the National Labor Relations Act is to promote industrial peace and harmony. The policy here sought to be enforced by the Board would lead to the inescapable result of having a party to negotiations, at the very beginning, filing a general charge with the Board, in some manner keep it from being acted upon, possibly as here by an untimely request for review of the Regional Director's dismissal of the charge, never acted on by the General Counsel, and hope to maneuver the adversary into a position where it could be contended that some particular act on his part at a subsequent date would constitute a refusal to bargain. This is and could amount to nothing more than a "fishing expedition" of the broadest type, and is tantamount to a general injunction. Courts have long guarded against both evils. This is not answered by the

statement that one would not be able to keep the charge alive and keep it from being acted upon, for as is seen here, the charge was filed on May 20, 1954, and lay dormant until August 17, 1955, fifteen months later. Such a policy could not lend itself to constructive bargaining negotiations. If Section 10 (b) of the Act has any meaning at all, it precludes the Board from taking such action.

The Board argues before this Court that the decision of the Court below would restrict its authority and hamper its enforcement of the Act because it restricts the Board to the precise violation particularized in the charge. This is false argument by the Petitioner. The decision of the Court below does not so curtail the Board. Further, the decision of the Court below is in keeping with the various decisions that the Board may enlarge upon the charge as to violations of the Act related to and growing out of violations of the Act occurring before the filing of the charge. The only restriction placed upon the Board by the decision below is that the Board cannot look to events occurring subsequent to the filing of the charge as the basis of a complaint or order, particularly when the subsequent event looked to occurs more than six months before issuance of the complaint. Such is the plain dictate of Congress under Section 10 (b) of the Act.

The alleged unfair labor practice here involved, did not grow out of an unfair labor practice alleged in the charge as in the *National Licorice Company* case. In this case there was no unfair labor practice at the time of the filing of the charge. In the *National Licorice Company* case, a

charge was filed on August 2, 1937, alleging that the employer had coerced and attempted to coerce its employees into signing individual contracts and that the company had called meetings of its employees and compelled them to attend meetings and attempted to compel the employees to form committees not of their own choosing to bargain collectively with the company. By the time the complaint was issued, only two months later, on October 2, 1937, the employer therein had initiated a labor organization of its employees which it dominated and this was set out in the complaint. The Court of Appeals therein held and this court affirmed that all of the Acts there involved constituted only one transaction and that the Board was within its powers in treating the whole sequence as one. *(309 U. S. 369.)*

An entirely different situation here exists. The charge in this case alleges only that Respondent on or about November 20, 1953, refused to bargain with the Union (R. 20.) Attention is directed to the fact that the charge does not allege that Respondent refused to bargain on any date other than November 20, 1953, or that the refusal to bargain was of a continuing nature. A mere charge of refusal to bargain on a date certain, without alleging "at all times since" is not a charge of a continuing offense. *American Federation of Grain Millers v. N.L.R.B. 197 F. 2d 454.* Further, the Board itself concedes that the earliest date that any refusal to bargain could be found is November 21, 1953, thus, the charge alleging a refusal to bargain as having occurred more than six months prior to the filing thereof, was void from its inception and any

complaint issued thereon is likewise void. Further, subsequent to the *National Licorice Case*, Congress added the six month limitation provision to Section 10 (b) of the Act, and the events here relied upon were found to have occurred more than six months before the issuance of the complaint.

3. The Filing of a Charge Does Not Toll the Six Months Limitation Provision of the Act as to Subsequent Events

The Board argues before this Court, that one of the purposes of the amendment of Section 10 (b) of the Act is to prevent the resurrection of stale charges long after their commission in order that relevant evidence and records might be available to the wrong doer. Admittedly, this is one of the purposes of the amendment of Section 10 (b) of the Act but no means the sole purpose thereof. The Board argues that once the charge is filed, the whole purpose of the amendment is accomplished because the alleged wrong doer is then put on notice that all of his subsequent actions are under surveillance by the Board. This reasoning is not tenable, particularly as to events not alleged in the charge, and not growing out of any alleged actions committed before the charge is filed. Certainly, the same basic reason against the resurrection of stale charges exists for not resurrecting events more than six months prior to the issuance of a complaint as a charge. There might be some merit to this argument of the Board from the standpoint of stale charges if the alleged violation in question occurred within six months of the filing of the complaint. However,

there is no merit to the argument, wherein the alleged violation occurs not only subsequent to the filing of the charge but almost a year prior to the issuance of the complaint, as here.

The Court below does not hold, as argued by Petitioner, that the complaint must be confined to the exact limits of the claimed violation set forth in the charge. The Court below holds that the complaint must confine itself to matters related to or growing out of unfair labor practices alleged and found to have been committed prior to the filing of the charge. As stated by the Court below, if the charging party wished to put the October wage increase in issue, it was incumbent upon it to file a new charge or an amended charge. In the language of the court below:

> "Assuming that another charge could have been filed embracing the happenings of October and November, 1954, or the original charge amended to include them, it was not proper for the Board to proceed on the basis of the charge of May 10, 1954 and enter the order here before us bottomed upon actions taken more than four months later. That this is what it did is exemplified by what the Board said was the issue it was trying: 'The issue before us is whether the Respondent, in this long course of dealing with the Union, fulfilled its duty to negotiate in good faith so as to justify its refusal in November 1954 to prolong the discussion of collective bargaining issues, or whether on the other hand it evaded its legal duty and was thus without warrant in November 1954 and thereafter for refusing to meet with the Union.' Substantially eight of the eleven pages constituting the decision are devoted to a discussion of what transpired in September, October and November. If the Board could thus adjudicate the rights of the parties on such subsequent ac-

> tions which as far as the record reveals, developed from the later stages of the negotiations, using the period covered by the charge merely as background, the statutory scheme would be frustrated and the charge, which alone conferred jurisdiction, would serve only as the trigger to set the mechanism in motion, leaving the Board and its agent carte blanche to expand the charge as they might please, or to ignore it altogether." (R. 543-544.)

In fact, the failure of the Union to file a charge incorporating the October wage increase and the November withdrawal of recognition is tantamount to an admission that it did not consider either of these events as violations of the Act. This reasoning by the union may have been prompted by the fact that it knew that it was advised of the October wage increase prior to its institution and that it knew at the time of the November withdrawal of recognition that it did not represent a majority of Respondents' employees. However, the reason is unimportant, the fact remains that the union remained silent and did not act when it had the duty to act if it desired to complain or invoke the jurisdiction of the Board as to the events in question.

Not only does the decision in the *National Licorice Company* case by this court fail to support the position of the Board here, but likewise the Court of Appeals cases cited by the Board as authority for its position, *National Labor Relations Board v. Kohler Company, 220 F. 2d 3* and *National Labor Relations Board v. Epstein, 203 F. 2d 483* are distinguishable from the facts of the present case. While in the *Kohler* case the Seventh Circuit made the general statement that the sixth month limitation refers only

to acts that occur before the charge and does not prohibit the inclusion of similar or related acts happening after the charge, the Board fails to take cognizance of the fact that here no acts occurred before the filing of the charge. It follows there could be no similar or related acts growing out of any acts which did not exist. As pointed out by the Court below, the acts mentioned in the *Kohler* case consisted of mere repetitions of applications by former employees named in the charges which had been made within the two six month periods covered by the charges. Also, the Seventh Circuit particularly pointed out in the *Kohler* case that there must be some relation between the charge and the complaint and if the Board gets so completely outside the situation which gave rise to the charge it may be said to be initiating the proceeding on its own motion, then the complaint should fall as not supported by the charge. *220 F. 2d 7*. This is exactly what the Board has here done. The Board has gotten completely away from the situation which gave rise to the filing of the charge and has in effect initiated a complaint upon its own accord in direct contravention of Section 10 (b) of the Act and of the decision in *National Labor Relations Board v. Hopwood Retinning Co., 98 F. 2d 97* and many other decisions.

In the *Epstein* case supra the Third Circuit stated by way of dictum that it thought that the complaint could have properly included matters occurring subsequent to the filing of the charge without the amended charge. It did so because the original charge alleged a continuing violation and the subsequent acts were of the same class and

were continuations of the act charged in pursuance of the same objects. *(203 F. 2d 485.)* That is not the situation in this case. There is no charge of a continuing violation and the act here relied on by the Board as constituting a violation of the Act is not and could not be a continuation of an earlier violation of the Act, particularly an act which did not exist. Also, in the *Epstein* case an amended charge was filed. That was not done in the instant case.

There are three well reasoned Circuit Court decisions holding that Section 10 (b) of the Act precludes the Board's issuance of a complaint and finding an unfair labor practice based upon events occurring subsequent to the filing of the charge. *N. L. R. B. v. Newton, 214 F. 471; Indiana Metal Products Corporation v. N. L. R. B., 202 F. 2d 613* and *N. L. R. B. v. I. B. S. Mfg. Co., 210 F. 2d 634.* In those cases, the respective courts held that the Board could not base an unfair labor practice finding upon a matter occurring subsequent to the filing of the charge and more than six months prior to the filing of either a complaint or an amended charge. As stated by the Fifth Circuit Court in the *Newton* case, without such limitation, the provisions of Section 10 (b) of the Act would be rendered meaningless to a great extent. The Ninth Circuit in the case of *N.L.R.B. v. Globe Wireless, 193 F. 2d 748, 752,* holds in effect that the Board is not debarred by the Amended Act from enlarging upon a charge unless the additional unfair labor practices alleged are committed more than six months prior to the enlargement. There is no question but that the enlargement here in question relates to acts occurring more

than six months prior to the enlargement. The Fourth Circuit has held likewise. *Joanna Cotton Mills v. N.L.R.B., 176 F. 2d 749.*

Respondent respectfully submits that not only Section 10 (b) of the 1947 Amendment precludes the Board issuing a complaint based upon any alleged unfair labor practices occurring more than six months prior to the filing of a charge or an amended charge but that even under the original Act, before amendment, the complaint in this case is fatally defective. In this case the events in question occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint could not grow out of or be related to any event occurring prior to the filing of the charge because none existed. Thus, even the *National Licorice Company Case* relied upon almost exclusively by petitioner, does not support the Board's position. However, if it did support the Board's position, Respondent submits that the 1947 amendment to Section 10 (b) of the Act stating in no uncertain terms the six month limitation period, precludes the Board from enlarging a complaint so as to include matters not included in the charge and occurring more than six months prior to the issuance of the complaint.

4. Insufficiency of the Evidence

While it is considered by Respondent that the questions heretofore discussed dispose of this case, and that the question of whether or not there is substantial evidence to support the Board's findings is not properly before this Honor-

able Court, inasmuch as the Board specifically urges it to the Court, Respondent feels that it should discuss this question.

It is well accepted by this Court that the primary duty of reviewing the actions of the National Labor Relations Board and ascertaining whether it complies with the substantial evidence rule lies with the various Circuit Court of Appeals. In the language of this Court in the case of *N. L. R. B. v. Pittsburg S. S. Company, 340 U. S. 498, 503; 71 S. Ct. 453, 456*, opinion by Mr. Justice Frankfurter, it is stated:

> "But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. * * * The same consideration that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues. This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded Judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situation we should adhere to the usual rule of non-interference where conclusions of Circuit Court of Appeals depend on appreciation of circumstances which admit of different interpretations."

This Court reaffirmed this language in an opinion by Chief Justice Vinson in the case of *N. L. R. B. v. American National Insurance Company, 343 U. S. 395, 410; 72 S. Ct. 824, 832.* As stated by the Court below, neither the Trial Examiner nor the Board found, and the evidence does not reflect that any lack of good faith was practiced during the period of November 21, 1953 to May 20, 1954. (R. 546.) In the concurring opinion by Chief Justice Hutcheson it is stated that were the only question in the case whether the record as a whole supports the Board's finding that, as charged by the union, and alleged in Paragraph 8 of the Complaint, Respondent refused to bargain in good faith in violation of Section 8 (a) (1) of the Act, I would content myself with concurring in the view of the majority that it does not. (R. 548.) The Court below further states that but for the allegations with regard to the October 7, 1954 wage increase, unsupported by any charge and for the proof that came in under it, there was there could be, no reasonable basis for the finding of the Board. Without aid from this source, in short, the Board's finding that Respondent did not bargain in good faith, runs directly contrary to the teaching of the statutes. (R. 549.)

The Court below has indicated that the evidence does not support a finding of a refusal to bargain against this Respondent. This Court has repeatedly held that such finding was not to be reviewed nor disturbed by this Court except in the most unusual situations. Notwithstanding, the Petitioner seeks to have this Court review its allegations that Respondent prior to May 20, 1954, refused to bargain.

(Board's Brief 23-25.) Many of the various items petitioner sets out therein as constituting refusal to bargain were discussed by the Court below. (R. 546.) The Court below held that the evidence on these matters argued by Petitioner did not support a finding of refusal to bargain.

If this Honorable Court should for any reason, deviate from its previously announced procedure, and decide to consider the substantiality of the evidence in this case, particular attention is called to the fact that the official record is far from complete. During the hearing before the Board, complete transcripts of each bargaining session were introduced into evidence. This consisted of 19 exhibits of an average length of about 125 pages each. The brief extracts from these transcripts in the record do not give a complete picture of the negotiations between Respondent and the union. While the Court below specifically did not pass on the substantiality of the evidence, it did read the entire record, not just the appendices. (R. 539.) It is on this background that the Court below makes some statements by way of dictum indicating that it did not feel there was substantial evidence to support a refusal to bargain charge, of which Petitioner so vigorously complains. While this is one of the very reasons this Court should not disturb substantiality of evidence decisions by Courts of Appeals, if this Court now decides to pass on this question, it is believed that it too will carefully consider the entire record, not just the appendices, in order that it too may have the complete picture of negotiations.

As heretofore pointed out, Counsel for Petitioner announced during the hearing that it had no act that constituted a refusal to bargain prior to the end of negotiations. (R. 479-480.) Now for the first time, Petitioner changes its position and argues that certain alleged instances do constitute a refusal to bargain. For instance, Petitioner contends that Respondent's negotiators were curtailed in their authority to bargain over bargainable matter. The evidence relied upon by Petitioner, in this connection, was interpreted by the Trial Examiner during the course of the hearing to mean that there were items which Respondent's President did not wish to be in the contract. (R. 491.) In this connection, the Trial Examiner stated:

> "As I understand the testimony, the import of the testimony up to date, it is that Mr. Fant did issue instruction or at least instructed his committee, so to speak, of his desire as to what he wanted or did not want in the contract." (R. 491.)

Further, the record is abundant with evidence that on the very matters which Petitioner contends Respondent's negotiators had been restricted in their bargaining, Respondent did meet and bargain and discuss with the union negotiators. For instance, the Court below states that the question of arbitration was discussed at three meetings and the question of wages at five meetings prior to May 20, 1954. (R. 546.) Respondent did insist on a non-strike clause but as to the arbitration clause, Respondent indicated its willingness to have a limited form of arbitration or an arbitra-

tion clause placing a limit on the number of times it could be used. (R. 501-503.) Also, Respondent attempted to bargain and made concessions as to its desired no-strike clause. (R. 469.) Respondent knows of no authority holding that bargaining for a non-strike clause and the omission of an arbitration clause is per se refusal to bargain in violation of the Act. Respondent does not believe that such will be the holding of this Court. Likewise, Respondent's desire not to bind itself by contract to enter into an agreement whereby it contracted to pay vacations, even though it had had a week's vacation for a period of time prior thereto, does not constitute a violation of the Act. Rather, a part of the risk incurred by employees when their bargaining agent negotiates a contract, is that he will barter off some of the privileges and benefits previously enjoyed by them.

With regard to the desire of Respondent to have the right to raise wages, Respondent attempted to negotiate on this subject. Even though a steadfast demand for such right would not constitute a refusal to bargain, Respondent agreed to contract to pay the current wages for the period of the contract. (R. 95.) The union initially agreed to such but later changed its position. Respondent did ask for a right to raise and lower wages, to which the union objected. Respondent then suggested that certain minimums and maximums be inserted within which range Respondent would be bound, to which the union refused to agree. (R. 508-509.) Respondent did not make counter proposals more stringent than those it had hitherto urged, as argued by the

Board. Certainly there were different ideas proposed by Respondent in an effort to find some area of agreement. It was understood and agreed between the parties that no agreement on any specific issue would be binding until an agreement upon the entire contract had been reached. (R. 490.) This is necessary because any contract must be a give and take proposition and though a single subject may be agreed upon, when one yields somewhere else, it may necessitate a reopening of a matter earlier agreed upon. Respondent did not refuse to agree to the proposal for selecting a neutral arbitrator but rather stated, as heretofore shown, that it would agree upon some limited form of arbitration. Also, Respondent did not refuse to furnish information relative to classifications and wage rates at its plant, notwithstanding the Board's argument to the contrary. (R. 210-211; 517-518.) The various cases cited by Petitioner in support of its broad propositions of law have to do with entirely different fact situations than those which here exist. Respondent made numerous concessions during the negotiations. Among those concessions were an agreement to an increased shift differential in accordance with a request by the union; (R. 25) an agreement to make certain wage adjustments in its feed mill at the request of the Union; (R. 393-394; 498-499; 286-288; 517-518) an agreement to contract as to wage rates to classifications among its employees, or in the alternative, to establish minimum and maximum rates for each classification at the union's demand; (R. 507-509; 281) a concession to Union demands for a seniority clause with the exception that Respondent

wanted to allow for a man's ability to work to have some part in determining promotions, demotions, layoffs and recalls, etc.; (R. 519-521) an agreement on paid holidays as requested by the union; (R. 500, 522) an agreement on reporting pay and call-in time demanded by the union. (R. 522-523.) There were various other concessions which one could go on at length to mention that Respondent made and yielded its position in an effort to arrive at a workable contract with the union. Petitioner seemingly would find Respondent guilty of a refusal to bargain by the mere fact that it did not agree to certain things that Petitioner thinks it should have agreed to. Petitioner loses sight of the fact that the Act itself only requires one to make a bona fide effort to reach an agreement and expressly provides that the obligation to bargain and enter into a contract in writing does not compel either party to agree to a proposal or require the making of a concession. *National Labor Relations Act*, Sec. 8 (d). Respondent bargained in good faith, wanted an agreement in writing but could not obtain a contract that it was willing to accept. The Act does not require capitulation. This has been held many times by our Courts. *Texas Foundaries, Inc. v. N. L. R. B., 211 F. 2d 791; N. L. R. B. v. United Clay Mines, Corp., 219 F. 2d 120; N. L. R. B. v. I. B. S. Manufacturing Company, 210 F. 2d 634; N. L. R. B. v. American National Insurance Company, 343 U. S. 395* and many other cases.

The record is replete with evidence that Respondent did bargain in good faith and evidence to the contrary is totally lacking. In fact, Counsel for Petitioner in the hearing, and

Petitioner in its order and before the Court below, conceded that but for the October 7, 1954 wage increase and subsequent withdrawal of recognition, there was not evidence of a refusal to bargain. Thus, it follows that the decision of the Court below that there is not sufficient evidence to support the Board's order finding that Respondent did not bargain in good faith should not be disturbed by this Court. *N. L. R. B. v. American National Insurance Company*, supra.

The real reason that no contract was reached during negotiations was because of the adamancy of the union. As heretofore pointed out, there were only two matters of major importance according to the union negotiators that stood between them. These two matters were those of arbitration and seniority. As heretofore abundantly pointed out to the Court, the Union, throughout negotiations, insisted that it was going to have an unlimited arbitration clause in the contract and that length of service alone was going to control promotion, demotions, layoffs, recalls etc. Respondent made various efforts of compromising the adamant position of the union in regard to these two matters all to no avail. It was at the negotiation conference of September 17, 1954 and the one immediately prior thereto that the union became very adamant in its position about an unlimited arbitration clause. At those meetings the union stated that it was going to have such a clause even if it meant spending six months and then six months again negotiating therefor. (R. 433, 514-516.) Thus, it was the union's refusal to bargain and the impasse created by this

adamant stand that actually resulted in the failure of a contract being reached. In such a situation, there can be no refusal to bargain by Respondent. *N.L.R.B. v. Algoma Plywood and Veneer Company, 121 F. 2d 602; Superior Engraving Company v. N.L.R.B., 183 F. 2d 783.* Thus, it is quite evident that at least by September 17, 1954 an impasse had been reached and the subsequent wage increase by Respondent would not under any circumstance, until the impasse was broken, constitute a refusal to bargain. This impasse was never broken.

B.

Second Question

Whether or not the National Labor Relations Board has jurisdiction of a matter wherein the complaint is issued contrary to its published Rules and Regulations and the Administration Procedure Act.

1. The Charge Is Void

Respondent submits that under the fact situations of this case, jurisdiction was never vested in the National Labor Relations Board.

As heretofore pointed out, the charge, upon which the complaint issued, charged Respondent with refusing to bargain on or about November 20, 1953, and was filed on May 20, 1954. It is conceded by Petitioner that the six month statute of limitation placed in the Act ran as of November 21, 1953. Thus, this allegation of the charge was and is void and would not support a complaint. The charge being

void, the necessary prerequisite for the Board to exercise jurisdiction is lacking. *National Labor Relations Board v. Vare, 206 F. 2d 543.* Petitioner, by implication, seeks to save the charge by arguing that it is a charge of a continuing nature inasmuch as the Board's form has in it the printed language that the employer has engaged in and is engaging in unfair labor practices within the meaning of the Act. However, this does not save the charge as in that part of the form wherein the basis of the charge must be set out, it is alleged by the charging union that on or about November 20, 1953 Respondent refused to bargain. There is nothing whatever said about Respondent refusing to bargain on any other date or at anytime since November 20, 1953. The mere fact that it is a charge of a refusal to bargain does not make it continuing in nature. *American Federation of Grain Millers v. N.L.R.B., 197 F. 2d 451.* Further, this printed part of the charge at the most could mean nothing more than that it is contended that the one complained against is engaging in the act complained of as of the date the charge is signed. In this case, May 20, 1954.

2. Regional Directors Dismissal of Charge Became Final

Secondly, the charge filed by the Union was dismissed by the Regional Director from which there was no timely appeal. As heretofore pointed out, *Section 102.19 of the Board's Rules and Regulations* provides that a copy of a request for review of the Regional Director's action must be made within 10 days by any party wishing a review thereof. In this case, the Regional Director refused to issue

a complaint and gave written notice thereof to the parties on July 13, 1954. (R. 24-28.) No extension of time was made for making request for review so far as is known by Respondent and no granting of an extension of time appears in the record. On July 31, 1954, the union made a request for review, stating that it had been given an extension of time until August 2, 1954. However, there is nothing in the record to show that such an extension of time was given or asked for. A timely request not having been made for review, the decision of the Regional Director dismissing the charge became final and no charge was before the Board on August 17, 1955 on which it could base a complaint, and there was no authorized issuance thereof.

3. Regional Directors' Unauthorized Withdrawal of Dismissal

Thirdly, even if there had been a timely appeal of the Regional Director's refusal to issue a complaint, *Section 101.6 of the National Labor Relations Board's Statements of Procedure* provides that the entire file be sent to Washington D. C. and the General Counsel may sustain the Regional Director's dismissal or may direct the Regional Director to take further action. At no time did General Counsel direct the Regional Director to take further action. Rather, on January 24, 1955, the Regional Director, upon his own volition, advised the parties that he was withdrawing his refusal to issue the complaint with respect to the alleged 8 (a) (5) allegation of refusal to bargain. (R. 80.) This all occurred at a time when the office of

General Counsel was vacant. (R. 132.) The Regional Director was not authorized to act in this instance. A notice of withdrawal of refusal to issue complaint with respect to 8 (a) (5) allegation refers to additional evidence having been furnished the Regional Director and the Regional Director advised Respondent that such additional evidence was the wage increase of October 6, 1954. The Regional Director had no authority to consider such additional evidence in connection with a charge upon which he had already acted. If the union wished to place this matter in issue in the language of the court below, it could have and should have filed a new charge including such. (R. 547-548.) The union chose not to do this and the Board and its agencies are without power to do it for them or to consider it as having been done. Assuming the Regional Director correctly dismissed the charge initially, it follows that General Counsel would affirm such dismissal. The additional evidence referred to was not before General Counsel. The only conclusion that can be reached is that this unorthodox and unauthorized procedure, contrary to the *Administrative Procedure Act*, prejudiced respondent.

4. General Counsel Affirms Regional Directors' Dismissal

Fourth, General Counsel apparently attempted to rectify this irregular and unauthorized procedure and wrote the parties a letter on August 12, 1955, 8 months subsequent to the Regional Director's notification that he had withdrawn his refusal to issue a complaint, advising them of the Regional Director's actions of January 24, 1955 and sustaining the ruling of the Regional Director dismissing

alleged violations of Sections 8 (a) (1) and (3) of the Act. Petitioner in fact argues that this letter rectifies all of the improper procedure engaged in by the Regional Director. The letter does not and could not do such. The letter in effect sustained the Regional Director's dismissal of the allegations in the charge pertaining to violations of Sections 8 (a) (1) and 8 (a) (3) of the Act, and thereby dismissed the charge in its entirety. No violation of Section 8 (a) (5) of the Act could exist without a violation of 8 (a) (1) of the Act. Notwithstanding, General Counsel having sustained the Regional Director's dismissal of Sections 8 (a) (1) and (3) allegations contained in the charge, only five days later, on August 17, 1955, the Regional Director issued a complaint wherein it is alleged that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) sub-section (1) of the Act. (R. 88-89.) This, the Regional Director had no authority to do.

In the complaint issued, the only event that is alleged with any particularity charging Respondent with violating the National Labor Relations Act is an allegation that Respondent on or about October 7, 1954, without notice to the union, put into effect a general wage increase to all employees in the unit described above. (R. 88.) It is self evident that this is the heart of the complaint and is the only basis upon which it was issued. This is directly contrary to Section 10 (b) of the Act as heretofore pointed out.

Thus, we see that the complaint in this case has been issued directly contrary to the *Board's Rules and Regula-*

tions and *Statements of Procedure*, the *Administrative Procedure Act* and *The National Labor Relations Act* itself. It cannot be argued by any party conscientiously that the *Board's Rules and Regulations* and *Statements of Procedure* have been followed. The Petitioner apparently wishes to ignore this unorthodox and unauthorized procedure. However, such *Statements of Procedure and Rules and Regulations* have been published in the *Federal Register* under the provisions of *The Administrative Procedure Act* and the Board is bound thereby and any procedure not in accordance therewith is invalid in its entirety. *Ohm v. Perkins, 79 F. 2d 533.* Nor, as the dissenting member of the Board points out, is it any answer to say that a departure from the Rules and Regulations is unimportant? *McKay v. Wahlenmaier, 226 F. 2d 35; Bridges v. Wixon, 326 U. S., 135; Accardu v. Shaunessy, 347 U. S. 260.* It is clear that a departure has been had from the published statements of procedure of the Board to the prejudice of the Respondent. *The Administrative Procedure Act* specifically provides that no person shall in any manner be required to resort to organization or procedure not so published.

VIII.

CONCLUSION

Thus, we find that not only does the Board seek enforcement of an order based upon a matter over which it does not have jurisdiction inasmuch as its rules and procedure were not complied with, but that it also seeks enforcement of an order based upon an event which occurred subsequent to

the filing of any charge and more than six months prior to the issuance of a complaint over which its jurisdiction was never invoked within the meaning of the Act itself and which was barred by the six month limitation provision of the statute. Further, Petitioner tries to impose upon this Court the task of passing in the first instance upon the substantiality of the evidence, a matter that Congress did not intend for this Court to do and which this Court has steadfastly refused to do.

It follows that the judgment of the Court below denying enforcement of the Board's order should be in all things affirmed.

Respectfully submitted,

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March 18, 1959.

IX.

CERTIFICATE OF SERVICE

The undersigned Counsel for Respondent certifies that five copies of the foregoing brief were deposited in the United States Post Office with Air Mail postage prepaid to each Hon. J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C. and Jerome Fenton, General Counsel, National Labor Relations Board, Washington 25, D. C., this 18th day of March, 1959.

O. B. FISHER
Of Counsel for Respondent